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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 UNITED STATES OF AMERICA,  
12 Plaintiff,  
13 v.  
14 BRENT ROGER WILKES,  
15 Defendant.  
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Case No.: 07cr330-LAB-1 and  
15cv2841-LAB

**ORDER REQUIRING DEFENDANT  
TO PROFFER EVIDENCE;**

**ORDER REQUIRING  
SUPPLEMENTAL BRIEFING BY  
MARK GERAGOS; AND**

**ORDER PERMITTING RESPONSE  
BY THE GOVERNMENT**

20 Brent Wilkes filed a motion under 28 U.S.C. § 2255 seeking to vacate his  
21 conviction, and requesting an evidentiary hearing. Most of his claims were denied, but  
22 additional briefing was ordered on his claims of ineffective assistance of counsel. His  
23 trial attorney, Mark Geragos, was ordered to address factual assertions Wilkes made in  
24 support of his First, Eighth, and Fourteenth claims. Most of Wilkes' claims of ineffective  
25 assistance of appellate counsel were denied, but to the extent they depended on  
26 ineffective assistance of trial counsel, the Court reserved on those issues. Geragos has  
27 now filed his sworn declaration, and it has been served on Wilkes.

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## Supplemental Response Required of Geragos

While Geragos suggested that he did not have time to obtain, prepare, and present all the evidence he believes he should have, he never specifically identified any evidence that, given the opportunity, he could have presented that might have altered the outcome. In fact, the wording of his declaration suggests he isn't able to identify witnesses or evidence specifically, or how they would have helped acquit Wilkes. The most he appears to be willing to say is that he thinks some evidence exists.

If, however, Geragos is able to identify any witnesses whose testimony he believes he should have presented, or other evidence he should have presented but could not, he must file a declaration by **January 29, 2018**. His declaration must specifically identify the source of the testimony or other evidence, explain what that testimony would have been or what the evidence would have said, and specifically how he believes it would have changed the outcome.

## Response Required of Wilkes

Geragos' declaration, if accepted as true, shows that he was not ineffective, and means Wilkes' remaining claims fail. Wilkes is therefore **ORDERED** to file a response no later than **January 29, 2018**, in the form of a declaration that includes all the testimony and other evidence that he wishes to offer in support of his ineffective assistance of counsel claim.

One topic Geragos was not asked to address, but did, was whether the Court's rulings placed unreasonable and unfair constraints on him. Geragos argues that the Court's rulings hindered his preparation, such that although he committed no unprofessional errors, his representation of Wilkes was rendered ineffective. He says he believes Wilkes would have been acquitted otherwise.

Claims arising from the Court's evidentiary and scheduling rulings could have been raised on direct appeal. Most were, and all that were raised were denied. *See United States v. Wilkes*, 744 F.3d 1101 (9<sup>th</sup> Cir. 2014) (holding that additional evidence Wilkes pointed to did not merit a new trial); *United States v. Wilkes*, 662 F.3d 524, 543

1 (9<sup>th</sup> Cir. 2011) (holding that the Court's denial of a continuance was not an abuse of  
2 discretion, and that Wilkes was not prejudiced by it). In other words, the Ninth Circuit  
3 rejected Geragos' assertion that the Court's rulings unfairly led to Wilkes' conviction.  
4 And the Court has already ruled on them. (*See* Docket no. 535 at 21 n.9.)

5 Wilkes' declaration should not address the Court's rulings at trial. Instead, it  
6 should focus on rebutting Geragos' declaration, and attesting to facts he believes point to  
7 Geragos' own ineffectiveness as defense counsel. Wilkes' declaration should include all  
8 facts he wishes the Court to consider when deciding whether Geragos was ineffective as  
9 his trial counsel. He may also attach exhibits to support his claim.<sup>1</sup> He must not, however,  
10 attempt to re-argue claims the Court has already denied, or attempt to raise other claims.  
11 If he does, his response may be rejected for filing.

12 Concerning any testimony or other evidence Wilkes believes Geragos should have  
13 presented at trial, he must specifically identify the witness or witnesses and what he  
14 believes they would have said. He must also specifically identify any other evidence and  
15 what it would have said. And he must explain specifically how this testimony or  
16 evidence would have changed the outcome.<sup>2</sup>

17 Wilkes' response should serve as a proffer — that is, it should show what evidence  
18 he would present at an evidentiary hearing on his claims of ineffective assistance of  
19 counsel, if such a hearing were held. His response should be complete in itself, without  
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23 <sup>1</sup> Any exhibits Wilkes attaches must be authenticated as required by Fed. R. Evid. 901. He may do this,  
24 for example, by attaching his own declaration under penalty of perjury identifying what the documents  
25 are, and how he knows they are what he claims they are. *See* Fed. R. Evid. 901(b)(1).

26 <sup>2</sup> Wilkes' moving papers claimed very generally and broadly that testimony he pointed out to Geragos  
27 would have convinced a jury of his innocence. This type of generalized claim is not what is being asked  
28 of him. His declaration must specifically identify the evidence and its source; what it would have said;  
and how, in light of all the evidence presented at trial, it would have led to a different verdict. *See*  
*Wilkes*, 662 F.3d at 543 (citing *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2005))  
(explaining that a showing of actual prejudice requires a showing that specific evidence not presented  
would have led to a different verdict).

1 reference to other documents. He should not depend on the Court to look through  
2 documents he has filed in the past and piece together or argue his claims for him. The  
3 Court will not assume that Wilkes would be prepared to present any evidence at a hearing  
4 that he has not included in his response.

5 If Wilkes does not file a declaration when due, the Court will construe it to mean  
6 he concedes Geragos' declaration is true and complete, and may deny Wilkes' remaining  
7 claims on that basis.

8 **Government Permitted to Respond**

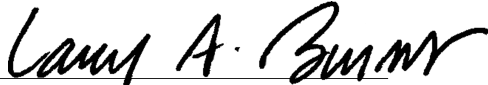
9 The government may, if it wishes, file a response addressing Wilkes' and Geragos'  
10 declarations. Its response should be supported by one or more declarations, and should  
11 be filed by **February 20, 2018**.

12 **Instructions to Court Clerk**

13 The Clerk is directed to email a copy of this order to Geragos at the email address  
14 provided in the docket, and also to send a copy to him by some method that will provide  
15 proof of receipt.

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17 **IT IS SO ORDERED.**

18 Dated: January 8, 2018

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20 Hon. Larry Alan Burns  
21 United States District Judge  
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